IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9015 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? YES : YES

2. To be referred to the Reporter or not? YES :

3. Whether Their Lordships wish to see the fair copy of the judgement? NO : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution : NO

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5. Whether it is to be circulated to the Civil Judge? : YES
To be circulated to Industrial Courts & Labour Courts.

GUJARAT STATE ROAD TRANSPORT CORPORATION

Versus

AMIRKHAN JAMIYATKHAN AAGVAR

Appearance:

MRS VASAVDATTA BHATT for Petitioner

MR JV BHAIRAVIA for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 23/03/2001

ORAL JUDGEMENT

1. Rule. Service of rule is waived by Shri

J.V.Bhairavia, learned advocate for the respondent.

1.1 Gujarat State Road Transport Corporation (through its Divisional Controller), Ahmedabad - petitioner has filed this petition under Article 226 and 227 of the Constitution of India challenging the judgment and award dated 20th May, 1999, passed by the learned Presiding Officer, Labour Court, Junagadh in Reference (LCJ) No.8/95 whereby the learned Judge has set aside the order of dismissal of the respondent Amirkhan Jamiyatkhan Aagvar by the Petitioner Corporation vide its order dated 22.10.93 and directed the Corporation to reinstate the respondent on the post of a helper or a peon with continuity of service with all consequential benefits with 35% backwages.

2. The facts giving rise to this petition are as under:

2.1 The respondent was employed as a conductor in the service of the Corporation. It has been alleged that from 1987 to 1993 for about 19 occasions he had committed default of not issuing tickets and also collecting fares from the passengers and all these occasions the Corporation had imposed some minor punishment to the present respondent.

2.2 On 21.10.88 the respondent was on duty which was plying from Junagadh to Bhavnagar route and during that time the said bus was checked by the checking party near Virpur road. During the checking it was found that the respondent had collected bus fare of Rs.28/- from a single group of 10 passengers but had not issued tickets to them till the bus was checked.

2.3 In this connection a chargesheet was issued to the respondent on 21.11.88. The respondent replied the said notice on 23.3.89. Thereafter the Corporation initiated regular departmental inquiry against respondent and respondent remained present before the Inquiry Authority on 16.8.91 and 23.9.93. During the course of inquiry, the checking officer who has checked the bus was also examined and he was also allowed to cross-examine by the respondent. On completion of inquiry the respondent was found guilty of the charges levelled against him.

2.4 Thereafter the Corporation had issued a show-cause-notice on 20.10.93 in connection with the punishment. The respondent replied said show-cause-notice on 20.10.93. After taking into consideration the reply filed by the respondent to the

said show-cause-notice the competent authority passed an order of dismissal against the respondent vide its order dated 22.10.93.

2.5 Being aggrieved and dissatisfied with the aforesaid order of dismissal, the respondent filed First Appeal before the First Appellate Authority. The First Appellate Authority heard the respondent employee and the First Appellate Authority by his order dated 13.6.94 pleased to reject the said appeal.

2.6 Thereafter the respondent conductor referred the matter to the Labour Court, Junagadh being a Reference (LCJ) No.8/95. The respondent filed a statement of claim before the Labour Court claiming that he should be reinstated with continuity of service and full backwages.

2.7 The Corporation had filed a written statement in the said reference before the Labour Court and denied all the averments which were made in the statement of claim and also stated before the Labour Court the correct state of affairs of the matter.

2.8 The Labour Court heard the reference and by its award dated 20.5.99 pleased to set aside the dismissal order of the respondent passed by the Competent Authority of the Corporation on 22.10.93 and directed the petitioner Corporation to reinstate the respondent on the post of a helper or a peon with continuity of service with all consequential benefits and with 35% backwages. However, the Labour Court came to the conclusion that the passengers who has stated that one passenger namely Ishwarbhai whose statement considered by the competent authority he was not examined in the departmental inquiry. On that ground the Labour Court held that the charges levelled against the employee has not been proved. In view of the aforesaid findings arrived at by the tribunal, the tribunal has considered Sec.11-A of the Industrial Disputes Act and also considered past records. The Tribunal also considered a purshis given by employee before the Labour Court that he is prepared to accept the post other than the post of conductor. Against that purshis, the Corporation objected to the same. However, the Labour Court set aside the order of dismissal order and directed the petitioner Corporation to reinstate the respondent on the post of a helper or a peon with continuity of service with all consequential benefits and with 35% backwages.

2.9 Being aggrieved and dissatisfied with the aforesaid judgment and award of the tribunal, the

Corporation filed this petition before this Court somewhere on January, 1999. This Court issued notice and also granted interim relief by his order dated 19th November, 1999.

3. Ms.Vasavdatta Bhatt, learned advocate appeared on behalf of Petitioner-Corporation has submitted that the Labour Court has erred in not appreciating the scope and ambit of its jurisdiction. She has submitted that the Labour Court has erred in observing that the charges levelled against petitioner in departmental inquiry is not proved only on the ground that one passenger was not examined before the departmental inquiry. She has submitted that the Labour Court has come to the conclusion that departmental inquiry was legal and valid and inspite of that the aforesaid finding is contrary to and inconsistent with the record of the case. She has further submitted that the Labour Court has also not properly exercised jurisdiction while setting aside the dismissal order and for granting reinstatement to a post of helper or peon and awarded 35% backwages.

3.1 The learned counsel for the petitioner-Corporation submitted that the Labour Court ought to have consider that in past 19 defaults committed by the respondent. It is further submitted that though respondent was given an opportunity to improve his conduct he has not improved and therefore the Labour Court has erred in awarding reinstatement with backwages to the respondent.

3.2 The learned advocate for the petitioner further submitted that the Labour Court ought to have seen lightly to the charges levelled the punishment imposed by the appropriate authority is proper. She has further submitted that the burden of proof is on the respondent-workman that in this case the Labour Court should not invoke powers under Sec.11-A of the Act. The respondent failed to discharge the burden in this behalf and relevant factors has also not been considered by the Labour Court.

3.3 Mr.Bhairavia, learned advocate for the respondent has tried to support the reasonings of the Labour Court in this behalf.

4. Before I consider the relevant aspects let me set out statutory provisions of the Act in this behalf.

4.1 Learned counsel for the petitioner submitted that the State Road Transport Corporation is constituted under

the Sec.3 of the Road Transport Corporations Act, 1950. The Corporation has been established to offer advantages to the public, trade and industry by the development of road transport and for the desirability of co-ordinating any form of road transport with any other form of transport, and also for the desirability of extending and improving the facilities for road transport in any area and of providing an efficient and economical system of road transport service therein. She has referred certain sections of the Road Transport Corporations Act, 1950, which reads as under:

Section 4 of the Act provides for incorporation. Section 5 of the Act provides for management of corporation and board of directors. Section 44 of the Act provides for power to make rules. Section 45 of the Act provides for power to make regulations.

Under Section 45 the Corporation has framed regulations which is known as Gujarat State Transport Employees Service Regulations.

Regulation 1 provides that these regulations may be called the "Gujarat State Transport Employees' Service Regulations".

Regulation 80 of the Corporation reads as under:

"The Corporation may specify the acts of misconduct or omission which shall be liable to be treated as "acts of misconduct" or "minor lapses or delinquencies" and also prescribe a procedure for dealing with cases of acts of misconduct and minor lapses and delinquencies and shall appoint appropriate authorities to impose punishments and to hear appeals or order disciplinary action."

4.2 In view of the provisions contained in Regulation 80 of the Gujarat State Transport Employees Regulations, the Corporation has framed Discipline and Appeal Procedure for the Gujarat State Road Transport Corporation Employees.

Regulation 3 provides that there shall be two clauses of offences:

(a) Acts of misconduct and

(b) Minor lapses and delinquencies.

(ii) of clause 3 provides that acts of misconduct are those which have been specified in Schedule `A' with such modifications as may be specified by the Corporation from time to time for which the maximum penalty is as prescribed in Clause 7, according to the gravity of the misconduct.

(iii) of clause 3 provides that minor lapses and delinquencies are those included in Schedule `B' with any modification that would be effected by the administration from time to time which may result in warning, reprimand and fines upto the limit prescribed in Clause 7.

Clause 7 provides the punishments may be awarded for good and sufficient reasons, including breaches of any rules of conduct, or for committing any of the offences mentioned in the Schedules, according to the gravity of the each case. The same are dealing with minor lapses and delinquencies and acts of misconduct.

Schedule A of the Discipline and Appeal Procedure for the Gujarat State Road Transport Corporation Employees provides acts of misconduct.

Clause 7 of the said Schedule provides as under:

"(a) Failure, without reasonable cause, on the part of Conductor to issue any ticket and thereby permitting ticketless travel and non-issue of ticket to a passenger by a Conductor after recovery of fares, or failure to issue a ticket to a passenger within the time prescribed in the orders of the Corporation.

(b) Failure on the part of checking staff to report offences on the part of Conductors for ticketless travel or for non-issue of tickets."

Clause 11 of the said Schedule provides for gross negligence resulting in serious loss to the Corporation or inconvenience to the public or both.

Clause 12 of the said Schedule provides for (a) Theft (b) Fraud, dishonesty or misappropriation in connection with the business or the property of the Corporation.

Clause 23 of the said Schedule provides for collecting money within the premises or vehicles of the Corporation except as sanctioned by any law for the time being in force or with the permission of the Competent Authority.

Clause 27 of the said Schedule provides for repeated or continued negligence or neglect of work.

Clause 34 of the said Schedule provides for excess over Rs.25/- found with a conductor without proper explanation or repeated excesses of smaller amounts found with a Conductor.

Clause 35 of the said Schedule provides for Under-issue of tickets i.e. issue of tickets for less than the actual distance travelled by a passenger and failure on the part of a Conductor to maintain records in the proper manner.

Schedule B provides for Minor lapses and Delinquencies.

4.3 On basis of this, the learned advocate for the Corporation stated that when act of employee conductor amounts to dishonesty or fraud and when workman is disloyal to the Corporation and when his act is falling within any of the above clauses it will amount to a serious misconduct and for that the Corporation/Competent Authority is entitled to dismiss the employee from the service. It has been stated that the employee is engaging in corruption activities and misconduct is proved then Labour Court has unnecessarily shown a sympathy to the workman by reinstating him in the service.

4.4 In view of the aforesaid legal aspects, she has submitted that the findings of the Labour Court that merely because the passenger was not examined the Corporation has failed to prove the guilty of the respondent employee is incorrect. She has referred to the detail report of the competent authority and also the cross-examination of the checker which has been referred in the order of dismissal by the competent authority. She stated that the checker was examined and he was cross-examined by the respondent employee. Even respondent has given his statement before the authority.

4.5 She has referred the judgment of the Hon'ble Apex Court in the case of State of Haryana and another Vs.

Rattan Singh reported in AIR 1977 S.C. 1512. In para 4 the Hon'ble Apex Court has held as under:

> "The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations and observance of rules of natural justice. Of course, fairplay is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held good. However, the courts below misdirected themselves, perhaps, in insisting that passengers who had come in and gone out should be chased and brought before the tribunal before a valid finding could be recorded. The simple point is, was there some evidence or was there no evidence - not in the sense of the technical rules governing regular court proceedings but in a fair commonsense way as men of understanding and worldly wisdom will accept. Viewed in this way, sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a finding is certainly available for the court to look into because it amounts to an error of law apparent of the record."

4.5(A) Learned counsel for the Corporation has relied upon judgment of this Court in the case of Parikshatbhai Madhavbhai Patel Vs. Division Controller, G.S.R.T.C. Surat reported in 2000(1) G.L.H. 31. In that case, appellant-employee Parikshatbhai Madhavbhai Patel was working as conductor with the Corporation. It was a case of the Corporation that when the appellant was on duty on Olphad-Punit route under Surat Depot, his bus was checked and it was found that though the appellant had collected amount of fare from certain passengers, he had not issued tickets nor he had closed way bill. A report was made and an inquiry was conducted against him wherein he was found guilty. He was, therefore, dismissed from service with effect from November 14, 1995.

4.5(B) Being aggrieved by the order of dismissal the appellant approached the Labour Court and in Reference (LCS) No. 190 of 1996. The Labour Court, Surat partly allowed the Reference by an award dated January 31, 1997 and directed the Corporation to reinstate the workman in service on the post of helper or peon without backwages.

4.5(C) Being dissatisfied with the award passed by the Labour Court, the Corporation preferred the petition.

The learned Single Judge of this Court by the judgment impugned in the petition observed that while inflicting punishment of dismissal, the competent authority took into consideration the fact that the workman was involved in similar kind of misconduct on earlier occasions also and was punished in past. He also observed that once the workman was dismissed from service by the Disciplinary Authority but the Appellate Authority took a lenient view and substituted order of dismissal by imposing lessor punishment. In spite of such leniency, again, the appellant committed similar misconduct. In the opinion of the learned Single Judge, therefore, the Labour Court had not exercised its discretion in accordance with law and had exceeded the jurisdiction. The learned single Judge observation which has been quoted in para 4 of the judgment (of Division Bench Judgment) reads as follows:

"I have considered the rival contentions. It is the settled legal position that it is not for the Labour Court to interfere with the punishment unless the same is found to be disproportionate to the guilt. The workman was perhaps labouring under the wrong impression that simply because he does not challenge the correctness of the domestic enquiry, he will be dealt with lightly. In view of this, the learned Judge, in my view, has exceeded the jurisdiction in interfering with the order of punishment."

"Accordingly, the petition was allowed and the order passed by the Labour Court was set aside by making the Rule absolute."

4.5(D) Being aggrieved and dissatisfied with the aforesaid judgment, the employee of the Corporation preferred LPA before this Court. The Division Bench of this Court after considering the judgment of the Hon'ble Apex Court in the case of The Indian Iron and Steel Co. Ltd. Vs. Their Workmen (AIR 1953 SC 130 at p.138), in para 12-A the Court observed as under:

"In our opinion, in the light of the law laid down by the Apex Court, it cannot be said that the powers of the Labour Court under Section 11-A of the Act are absolute or unqualified. The Labour Court can exercise the said power only when it is satisfied that the dismissal was not justified. In the facts and circumstances, the action of dismissal of workman cannot be said to be unjustified and hence in our opinion, the learned single Judge was right in holding that

the Labour Court exceeded its jurisdiction in passing the award impugned in the petition."

In para 20 of the said judgment the Court observed as under:

"These facts in our opinion, ought to have been taken into consideration in their proper perspective by the Labour Court. Power under Section 11-A of the Act ought to have been exercised with circumspection in the light of misconduct in the case on hand and as also misconduct in the past. By not doing so, the Labour Court exceeded jurisdiction vested in it and the learned single Judge has rightly interfered with the said award by setting aside reinstatement of the workman."

4.5(E) In view of this judgment, it was submitted by the learned counsel for the Corporation that the Labour Court has not properly exercised its jurisdiction in this behalf and exceeded its jurisdiction. She further submitted that this judgment is squarely applies to this case and, therefore, the petition of the Corporation should be allowed in this behalf.

4.5(F) Learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in the case of U.P. State Road Transport Corporation Vs. A.K. Parul reported in (1998) 9 SCC 416. He has also relied upon another judgment of the Hon'ble Supreme Court in the case of Janatha Bazar (South Kanara Central Co-operative Wholesale Stores Ltd.) Etc., Vs. Secretary, Sahakari Noukarara Sangh, Etc. reported in AIR Supreme Court Weekly 3439, particularly paras 6,7 and 8 the Hon'ble Supreme Court observed as under:

"Law on this point is well settled. (Re: Municipal Committee, Bahadurgarh v. Krishnan Behari, (1996) 2 SCC 714) : (1996 AIR SCW 1309: AIR 1996 SC 1249:1996 Lab IC 1056). In U.P.State Road Transport Corporation v. Basudeo Chaudhary, (1997) 11 SCC 370 this Court set aside the judgment passed by the High Court in a case where a conductor serving with the U.P.State Road Transport Corporation was removed from service on the ground that alleged misconduct of the conductor was attempt to cause loss of Rs.65/- to the Corporation by issuing tickets to 23 passengers for a sum of Rs.2.35 but recovering Rs.5.35 per head and also by making entry in the

way bill as having received the amount of Rs.2.35, which figure was subsequently altered to Rs.2.85. The Court held that it was not possible to say that Corporation removing the conductor from service has imposed a punishment which is disproportionate to his misconduct. Similarly in Punjab Dairy Development Corporation Ltd. v. Kala Singh, (1997) 6 SCC 159: (1997 AIR SCW 2625: AIR SC 2661: 1997 Lab IC 2649), this Court considered the case of a workman who was working as a Dairy Helper-cum-Cleaner for collecting the milk from various centres and was charged for the misconduct that he inflated the quantum of milk supplies in milk centres where there were less fat contents. The Court held that "in view of proof of misconduct a necessary consequence will be that Management has lost confidence that the workman would truthfully and faithfully carry on his duties and consequently the Labour Court rightly declined to exercise the power under Section 11-A of the I.D. Act to grant relief with minor penalty."

"In view of the aforesaid settled legal position, the High Court materially erred in confirming the directions given by the Labour Court in reinstating the respondent-workman with 25% back wages. For giving the aforesaid direction, the Labour Court considered that there is no evidence regarding past misconduct by the employees and, therefore, it can be observed that they have rendered several years of service without any blemish and to some extent, there was lapse on the part of the Management."

"In case of proved misappropriation, in our view, there is no question of considering past record. It is the discretion of the employer to consider the same in appropriate cases, but the Labour Court cannot substitute the penalty imposed by the employer in such cases."

4.5(G) Learned counsel for the petitioner has relied upon recent judgment of this Court in the case of Gujarat State Road Transport Corporation Vs. R.S.Prajapati reported in 2001 LAB I.C. 618. In that case this Court considered case of very Corporation. The learned Single Judge has relied upon the earlier Division Bench decision of this Court in the case of G.S.R.T.C. Vs. Jamnadas Becharbhai, 1982 G.L.H. 1057 and also judgment of Division Bench of this Court in the case of G.S.R.T.C.

Vs. Kachraji Motiji Parmar, 1993(1) G.L.R. 302. It may be noted that in that case the advocate for the employee has relied upon the judgment of the learned Single Judge in the case of G.S.R.T.C. Vs. Parshottam Premji Tank reported in 2000(2) G.L.H. 258, when the learned Single Judge has confronted with the aforesaid judgments of the learned Single Judge in Para 12 the learned Single Judge has observed as under:

> "There is no difficulty in following the said decision but at the same time we have to consider previous two decisions referred hereinabove which are the decisions recorded by the Division Bench of this Court, whereas the third decision referred to by the learned advocate for the respondent has been rendered by the learned Single Judge of this Court. Therefore, the principle enunciated in the former two decisions rendered by the Division Bench of this Court, will have preference over the third decision which has been rendered by the learned single Judge."

In para 13 on page 621 the Court has observed as under:

> "Now, in this case, it can be reasonably inferred in the present case that the respondent has put the petitioner corporation to a monetary loss. Moreover, the extreme punishment has not been inflicted but the department has considered it just and proper to retain the respondent in service and to impose such punishment with a view to provide an additional opportunity to the respondent to show improvement. At the same time, strict action is required to be taken by a public body with a view to set example so that the respondent may not repeat the said misconduct. Same way, it may also deter other employees in a public body committing or intending to commit similar faults. In that view of the matter, punishment imposed by the petitioner authority cannot be treated harsh and excessive considering the default of the petitioner in the present case and considering the past conduct as well as the conduct subsequent to the event in question."

4.5(H) The learned counsel for the petitioner has relied upon the judgment of this Court in the case of G.S.R.T.C. Vs. Rameshbhai D.Patel in Special Civil Application

No.3244 of 1992 decided on 8.11.2000 by this Court (Coram:K.M.Mehta,J.). In that case this Court considered the judgment of the Hon'ble Supreme Court in the case of U.P.State Road Transport Corporation Vs. A.K.Parul reported in (1998) 9 SCC 416, judgment of the Hon'ble Apex Court in the case of Janatha Bazar (South Kanara Central Co-operative Wholesale Stores Ltd.). Etc. Vs. Secretary, Sahakari Noukarara Sangh, Etc., reported in 37/2000 AIR Supreme Court Weekly 3439 and Division Bench judgment of this Court in the case of G.S.R.T.C. Vs. Kacheraji Motiji Parmar reported in 1993(1) GLR 302 and also Division Bench judgment of this Court in the case of Mihir Textiles Ltd. Vs. Narayansing Layaksingh reported in 1993 (1) GCD 137. This Court considered the provisions of Sec.11-A of the Act and wherein the Tribunal has granted reinstatement the workman in similar situation the Court held that Tribunal has failed to exercise jurisdiction under Sec.11-A of the Act wherein Tribunal was pleased to direct the reinstatement of the workman and to consider the service of the workman as continuous. The Court held that when there is a case of misappropriation of funds of the Corporation, the order of the Tribunal requires to be quashed and set aside. There also the Court considered the provisions of Sec.11-A of the Act in view of all these decisions which are referred.

4.6 Learned counsel has also relied upon judgment of this Court in the case of Chanduji Sendhaji Khant Vs. Gujarat State Road Transport Corporation reported in 1996(1) GLR 84. In para 9 the Learned Single Judge observed as under:

"Keeping in view the aforesaid precincts of judicial review under Arts. 226 and 227 of the Constitution of India, while examining the order passed by the Industrial Tribunal, I am of the opinion that under the facts and circumstances of the present case, exercise of discretion by the Tribunal cannot be sustained. It has nowhere recorded its satisfaction about the fact that punishment imposed upon the petitioner-workman was disproportionate to the guilt proved which is condition precedent for exercising discretion under Sec.11-A of the Act. The only ground which weighed with the Tribunal in ordering reinstatement is that with the current increase in cost of living and chances of not getting any other job would render the family of the petitioner-workman in difficult situation and as

the punishment should be reformative, the workman should be given one more chance to mend his conduct on humanitarian grounds. To say the least, these general grounds will be available and applicable in all cases of dismissal of any employee irrespective of gravity of misconduct or technical nature of misconduct for which punishment has been imposed. There is nothing to show how the workman concerned would be affected and to what extent even if socio-economic conditions are to be taken into consideration for the purpose of imposing punishment though as would be discussed presently, is not abstract requirement. In this case, the Tribunal has found inquiry to be fair and in accordance with law, and found misconduct proved which is of carrying passengers without tickets implying dishonest conduct on the part of the conductor to retain with him the amount collected by carrying passengers without tickets affecting revenue of a body of a public nature, which cannot be equated with petty theft once committed in momentary weakness on account of socio-economic condition of the concerned workman, but is serious misconduct on account of nature of criminal breach of trust. It has also come on record that there is history of past 77 misconducts behind the workman. Therefore, the impugned order neither records satisfaction about the punishment being not justified being disproportionate to the misconduct proved nor does it give any relevant reasons for substituting lesser punishment. Exercise of discretion under the circumstances cannot be sustained even on limited scrutiny permissible under law and conclusion to that extent arrived at by the Tribunal must be held to be perverse."

In para 14 of the said decision, the learned Single Judge has observed as under:

"Therefore, if viewed from the seriousness to which this Court in its decision referred to above in Jamnadas Becharbhai's case (supra) about the misconduct proved in the present case and fact of consistent past bad record on that account and there being nothing on record to suggest socio-economic condition of workman concerned which might have tempted him to indulge in this adventurism as momentary temptation and not part of regular habit, renders the whole

approach to the exercise of discretion by the Tribunal capricious, arbitrary and on extraneous considerations."

4.7 Learned counsel has also relied upon the decision of this Court in the case of Gujarat State Road Transport Corporation Vs. Bhikabhai Manjibhai reported in 1997(1) GLR 416. In para 10 the learned Single Judge has observed as under:

"In the instant case, the Labour Court has accepted the case of the Corporation and the workmen is held guilty but by exercising powers under Sec.11-A of the Act, directed the Corporation to re-employ the workman without considering the fact that in the past, the workman was found guilty in other cases and though opportunity was given to improve, he has again indulged in the same activity. In the circumstances, the order passed by the Labour Court cannot sustain."

4.8 Learned counsel has also relied upon another decision of this Court in the case of Shantilal M.Shah Vs. Dena Bank & Others reported in 1997(1) G.L.H. 942. In para 8 on page 948 the Court observed as under:

"The petitioner filed appeal against the order of dismissal and before the appellate authority he has not raised the point that no financial loss was caused to the Bank. The petitioner cannot be allowed to raise a new point before this Court. The learned counsel for the petitioner has failed to show that no financial loss has been caused to the Bank. Apart from this, even if we proceeded on the footing that no financial loss has been caused to the Bank, and whatever loan advanced by the Bank could have been recovered from the borrowers, the question is whether the petitioner should have been regard, reference may have to the decision of the Supreme Court in the case of Municipal Committee, Bahadurgarh Vs. Krishna Behari reported in 1996(2) SCC 714. In that case the respondent was dismissed from services of the Bank, on his conviction under Section 486 I.P.C. by the criminal court for committing forgery. Against the order of dismissal from service the respondent therein filed appeal. The Director of Local Bodies who, while upholding the correctness of the action, reduced the punishment to stoppage of four increments and has also directed that the

period during which the respondent was out of service should be treated as extraordinary leave. The Apex Court, while dealing with the appeal of the employer, held that the respondent has been convicted of a serious crime, and in a case of such nature indeed, in cases involving corruption there cannot be any other punishment than dismissal. Any sympathy shown in such cases is totally uncalled for and opposed to public interest. The Apex Court further observed that the amount misappropriated may be small or large; it is the act of misappropriation that is relevant."

4.9 Learned counsel for the petitioner has also submitted that when petitioner is dealing with the Corporation money, it is a public money and misappropriated by the employee of the Corporation is the misappropriation of the public money and must be treated a serious misconduct.

5. Learned counsel for the respondent has relied upon judgment of the Hon'ble Supreme Court in the case of AMC Vs. Mahendrabhai Jayantibhai Shukla reported in 2001 LAB I.C. 150. In that case also the Court held that when conductor had issued improper tickets the same would amount negligent but not misconduct. The Court held that punishment of dismissal is too harsh and the Court ordered for reinstatement with 25% backwages. In that case, factually the Court has come to the conclusion that instead of charging fare of Rs.1.80/- the respondent has charged Rs.1.50/- and from that peculiar facts and circumstances of the case this Court held that punishment of dismissal is too harsh. In my view the facts of that case is not applicable to this case.

5.1 Similarly learned counsel for the respondent has also relied upon judgment of this Court in the case of Gujarat State Road Transport Corporation Vs. Gordhanbhai P.Prajapati reported in 1999(1) GCD 460(Guj.). That case also considered that the Labour Court has taken into consideration the aspects of the case and modifying the order of punishment and Labour Court denied the relief of backwages to the respondent and in view of that the Court did not impose further punishment.

5.2 Similarly learned counsel for the respondent has also relied upon the judgment of this Court in the case of G.S.R.T.C. Vs. Danaji Sukhaji Kodiyar reported in 1993(2) G.L.H. 356. In that case also on facts of the case dismissed the petition in this behalf.

5.3 Similar other judgment has also relied upon by the learned Counsel for the respondent. However, in my view, in view of the decisions of the Hon'ble Apex Court in the case of Janatha Bazar (South Kanara Central Co-operative Wholesale Stores Ltd. Vs. Secretary, Sahakari Noukarara Sangh (supra) and Division Bench judgment in the case of Parikshatbhai Madhavbhai Patel (supra) which I have referred earlier, the subsequent Division Bench judgment of this Court it is not possible to agree with the findings of the Labour Court in this behalf and in my view looking to the grave misconduct committed by the respondent employee, the tribunal is not justified in awarding the punishment and giving 35% backwages to the respondent in this behalf. The Tribunal was also not justified in reinstating the respondent on the post of peon/helper.

6. Learned advocate for the petitioner-Corporation submitted that in this behalf the Tribunal has not considered whether the vacancy is available or not, without considering the Tribunal has passed that order and therefore this order is required to be quashed and set aside.

7. In view of the same, the impugned judgment and award dated 20.5.1999 passed by the Labour Court, Junagadh, in Reference (LCJ) No.8/95 is quashed and set aside. This Special Civil Application is allowed. Rule is made absolute.

8. Mr.Bhairaviya, learned advocate for the respondent has contended that his client is coming from very poor state of society and he is out of job since long time. It is no doubt true that post of conductor is a sensitive post and therefore he cannot be continued in the post of conductor. As such, however, he submitted that if he makes a representation to the Corporation to employ him to any other post (Except conductor), the Corporation may consider the case of the respondent kindly and sympathetically. This observation has been made in the peculiar facts and circumstances of the case without adjudicating the merits of the matter in this behalf and therefore this may not be treated as a precedent in this behalf.

9. Ms.Bhatt, learned advocate for the petitioner Corporation has strongly objected that once this Court comes to the conclusion on the merits of the matter that Labour Court has erred in passing the impugned judgment and award in favour of respondent then this Court may not

make any further observation in this behalf. I am conscious of this fact and I am making this observation only on humanitarian ground without adjudicating the matter on the merits of the case.

10. In view of the discussion and observations made hereinabove, this Special Civil Application is allowed. Rule is made absolute. No order as to costs.

(K.M. Mehta, J.)

syed/